NO. 75-1773

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

DESERT OUTDOOR ADVERTISING, INC.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Transportation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

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SUBJECT INDEX

	Page
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT . .	10
I THE STATE COURT JUDGMENT DID NOT DECIDE A SUBSTANTIAL FEDERAL QUESTION	10
II THE SUMMARY JUDGMENT WAS A DETERMINATION ON THE MERITS AND PETITIONER WAS NOT DENIED DUE PROCESS OF LAW	21
CONCLUSION	24

TABLE OF AUTHORITIES CITED

CASES

Art Neon Co. v. City and County of Denver, 488 F.2d 118 (1973)	18,19
D.C. Federation of Civil Association, Inc. v. Airis, 129 U.S. App. D.C. 125, 391 F.2d 478 (1968)	20

TABLE OF AUTHORITIES (Continued)

	Page
Daye v. Commonwealth of Pennsylvania, 344 F.Supp. 1337 (E.D. Pa., 1972), aff'd 483 F.2d 294 (3d Cir., 1973), cert. denied sub nom. Meyers v. Commonwealth of Pennsylvania, 416 U.S. 946, 94 S.Ct. 1956 (1974)	20
Desert Outdoor Advertising, Inc. v. County of San Bernardino, No. 144, October 1968 Term, U. S. Supreme Court, 37 U.S.L.W. 3016 (1968)	15, 19
Desert Outdoor Advertising, Inc. v. County of San Bernardino, 393 U.S. 8, 89 S.Ct. 45 (1968)	14
Desert Outdoor Advertising, Inc v. County of San Bernardino, 255 Cal.App.2d 765, 63 Cal.Rptr. 543 (1967) .	14
Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., 421 F.2d 1313 (1970) .	22,23
Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 2289 (1975)	18
Mahler v. United States, 306 F.2d 713 (3d Cir., 1962) . .	20

TABLE OF AUTHORITIES (Continued)

	Page
Markham Advertising Co., Inc. v. Washington, 393 U.S. 316, 89 S.Ct. 553, rehearing denied, 393 U.S. 1112, 89 S.Ct. 854 (1969)	17,18,19
Markham Advertising Company v. State, 439 P.2d 248 . . .	15,16,17
Martens v. Winder, 191 Cal. App.2d 143 (1961)	22
People ex rel. Dept. Pub. Wks. v. Adco Advertisers, 35 Cal.App.3d 507 (1973) . .	4,12,13
State of Vermont v. Brinegar, 379 F.Supp. 606 (1974) . . .	2,19

CODES

California Business and Professions Code:	
Section 5200, et seq.	4,10
Section 5410	6
Section 5412	4,10,11,12
California Code of Civil Procedure:	
Section 437(c)	22

TABLE OF AUTHORITIES (Continued)

FEDERAL STATUTES

	Page
Title 23 United States Code:	
Section 109	20
Section 131	2,3,10, 19,24
Section 131(b)	4,19
Section 145	2

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October Term, 1976

No. 75-1773

DESERT OUTDOOR ADVERTISING, INC.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Transportation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

Respondent prays that the Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, be denied.

QUESTIONS PRESENTED

The questions presented as stated on pages 2 and 3 of the Petition herein are totally incorrect and misleading insofar as they do not relate to the issues raised and litigated in the State court proceeding. The removal of Petitioner's billboards is required by State law, not federal law, and the procedure for paying just compensation is set forth exclusively in State law. The Federal-aid highway program is a "federally assisted State program", and 23 U.S.C. 131 and 145 only establish minimum standards for State control of billboards. As was made clear by the decision in State of Vermont v. Brinegar, 379 F.Supp. 606 (1974), the requirements of federal law for control of billboards and payment of compensation are only conditions for payment to the State of federal highway funds. Thus,

contrary to the Petition filed herein, there cannot be any issues raised herein by Petitioner with respect to compliance with 23 U.S.C. 131. The only question legitimately presented is whether or not State law provisions which allow for payment of just compensation after removal violate Petitioner's constitutional rights.

STATEMENT OF THE CASE

On July 31, 1973, Respondent The People of the State of California, acting by and through the Department of Transportation, filed a complaint in the Superior Court for Riverside County, State of California, in which the State sought an injunction compelling removal of 52 billboards owned by Desert Outdoor Advertising, Inc., and a declaratory judgment declaring that the billboards could be removed without payment of just compensation. The State's action was

predicated solely upon State law as contained in the California Outdoor Advertising Act (Bus. & Prof. Code § 5200, et seq.).

At the time the State filed its complaint in Riverside County, State law (California Bus. & Prof. Code § 5412) provided that just compensation was required only upon removal of billboards which were "lawfully in existence on October 22, 1965". As to billboards which were constructed after October 22, 1965, or which were constructed prior to October 22, 1965 but which existed in violation of law on that date, the State could require removal without payment of just compensation (People ex rel. Dept. Pub. Wks. v. Adco Advertisers, 35 Cal. App.3d 507 (1973)) without fear of incurring the penalty provisions contained in the Federal Highway Beautification Act of 1965 (23 U.S.C. 131(b)).

The contention of the State of California at the time it filed its complaint was that each of the billboards owned by Desert Outdoor existed in violation of Riverside County Ordinance No. 348 on October 22, 1965, and for that reason the State of California was not required to pay just compensation. Subsequent to the filing of the complaint by the State, in an unrelated action, Riverside County Ordinance No. 348 was declared unconstitutional by the Court of Appeal for the Fourth Appellate District in the State of California. Thereafter, the State of California abandoned its contention that it was not required to pay just compensation, and expressly admitted its obligation to pay compensation upon the removal of the billboards owned by Desert Outdoor.

California Business and Professions Code Section 5410 provided that any billboard located within 660 feet of the edge of the right of way of, and the copy of which was visible from, a penalty segment, which was lawfully maintained in existence on November 8, 1967 but which was not on that date in conformity with the provisions of the Outdoor Advertising Act, would not be required to be removed until July 1, 1970. In the course of the litigation in Riverside County, Petitioner herein expressly admitted that each of its billboards was not in conformity with the provisions of the Outdoor Advertising Act on November 8, 1967.

As a result of the admissions of Petitioner, a summary judgment was entered by the Riverside County Superior Court which ordered Petitioner to remove its nonconforming billboards and which

established Petitioner's right to payment of compensation "upon the removal of said outdoor advertising displays".

At the hearing of Respondent State of California's motion for summary judgment, Petitioner argued "that no removals could properly be ordered until just compensation was first paid". The same argument was urged on appeal. The appellate court summarized the case as follows:

> "A summary judgment was entered which ordered the defendants [Desert Outdoor Advertising, Inc.] to remove nonconforming billboards and established defendants' right to payment of compensation after the billboards were removed. Each of the billboards was nonconforming and subject to removal. The

respondent [State of California] concedes that the defendants are entitled to payment of compensation for the removal of these billboards."

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, Appendix A, pp. A-1 and A-2.

The appellate court did not accept Petitioner's argument that payment of just compensation was required <u>prior</u> to removal, and held as follows:

"Defendants, nevertheless, contend that they have a constitutional right to payment of compensation prior to the removal of the billboards. Their argument in this respect comes under an

eminent domain rationale. They do have the right to payment, under Business & Professions Code, § 5412, which provides that the owner of such advertising shall be paid 'just compensation.' Sections 5413 and 5414, <u>supra</u>, provide for the procedure for obtaining such payment. Since there is no constitutional right to payment before removal, the administrative and judicial procedure established by those sections appears fair and reasonable."

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, Appendix A, pp. A-4 and A-5.

REASONS FOR DENYING THE WRIT

I

THE STATE COURT JUDGMENT DID NOT DECIDE A SUBSTANTIAL FEDERAL QUESTION

The judgment requiring Petitioner Desert Outdoor Advertising, Inc., to remove its billboards was based solely upon provisions of the California Outdoor Advertising Act (California Bus. & Prof. Code § 5200, et seq.). The Outdoor Advertising Act regulates the placing and maintenance of billboards adjacent to almost all California State highways, and is a regulatory act based on the police power. Nowhere in the Outdoor Advertising Act is the State of California given legislative authority to exercise the power of eminent domain for the purpose of taking billboards. Quite to the contrary, in Section 5412 of the California

Business and Professions Code, which provides for payment of compensation upon removal of certain billboards, the Legislature unequivocally states that it does not intend to relinquish its powers under the police power.

> "If federal law requires the states to pay just compensation with regard to the removal of any advertising display, the owner or owners of such advertising display and the owner or owners of the land upon which such display is located, shall be paid just compensation. The sole intent of the Legislature in enacting this section is to comply with federal law, and it is otherwise not the intent of the Legislature to in any manner relinquish any of its powers

relating to the removal of advertising displays under the police power." (Emphasis added.)

California Business and Professions Code Section 5412.

That the removal of the billboard herein is required by a valid police power regulation, and is not an eminent domain taking, was expressly recognized by the Court of Appeal for the State of California in People ex rel. Dept. Pub. Wks. v. Adco Advertisers, supra, and by the Court of Appeal.

> "The removal provisions of the Outdoor Advertising Act are a valid exercise of the police power of the state, not a taking under the power of eminent domain. In considering the Outdoor Advertising Act, the court in Adco

pointed out that the Act constituted a valid exercise of the police power of the state and said, '"Regulations regarding and restrictions upon the use of property in an exercise of the police power for an authorized purpose, do not constitute the taking of property without compensation or give rise to constitutional cause for complaint."'" (Emphasis added.)

People ex rel. Dept. Pub. Wks. v. Adco Advertisers, supra, at p. 512; Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, Appendix A, pp. A-3 and A-4.

In the case of Desert Outdoor Advertising, Inc. v. County of San Bernardino, 255 Cal.App.2d 765, 63 Cal. Rptr. 543 (1967), the Petitioner herein sued the County of San Bernardino to enjoin enforcement of a county ordinance which prohibited billboards along certain freeways. In a consolidated action the County sought to abate as nuisances two billboards which violated the ordinance. Judgment was entered for the County, and on appeal it was held that the ordinance was a proper exercise of the police power. Desert Outdoor petitioned the United States Supreme Court for a hearing, and the appeal was dismissed for want of a substantial federal question (Desert Outdoor Advertising, Inc. v. County of San Bernardino, 393 U.S. 8, 89 S.Ct. 45 (1968)). The questions presented on appeal were:

(1) Can county, consistent with the Fourteenth Amendment, pass zoning ordinance requiring removal of preexisting bill-boards without payment of just compensation?

(2) Is such ordinance repugnant to Federal Highway Beautification Act, which requires payment of compensation for such removal?

(3) Can zoning ordinances based primarily or entirely on aesthetic grounds require removal of preexisting bill-boards?

See questions presented, Notice of Appeal, Desert Outdoor Advertising, Inc. v. County of San Bernardino, No. 144, October 1968 Term, U. S. Supreme Court, 37 U.S.L.W. 3016 (1968).

In the case of Markham Advertising

Company v. State, 439 P.2d 248, a number of billboard companies brought an action seeking a declaration that the Washington Highway Advertising Control Act of 1961 was unconstitutional. This state law was enacted to conform to the requirements of Pub. L. No. 85-767, ch. 1, sec. 131, 72 Stats. 904, formerly 23 U.S.C. 131. The plaintiffs also raised issues with respect to the 1965 Federal Highway Beautification Act, 23 U.S.C. 131. The state law in question required removal of nonconforming billboards adjacent to interstate highways after an amortization period, without payment of compensation.

The Washington Supreme Court held that the act being challenged was a valid exercise of the police power. Plaintiffs in Markham also claimed a denial of rights under the United States Constitution.

"Plaintiffs further contend that the Act deprives them of due process of law because it authorizes the taking of their property without compensation. U.S. Const. amend. 14; Const. art. 1, § 3. When a court determines, as we have in this case, that the police power has been properly invoked, there is no basis for this contention. Atlantic Coast Line R.R. Co. v. City of Goldsboro, 232 U.S. 548, 558, 34 S.Ct. 364, 58 L.Ed. 721 (1914); ..."

Markham Advertising Company v. State, supra, at p. 261.

On appeal to the United States Supreme Court, the appeal was dismissed for want of a substantial federal question (Markham Advertising Co., Inc. v.

Washington, 393 U.S. 316, 89 S.Ct. 553, rehearing denied, 393 U.S. 1112, 89 S.Ct. 854 (1969)).

In both the Desert and Markham cases the United States Supreme Court action, in dismissing for want of a substantial federal question, constituted a dismissal on the merits of the case (Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 2289 (1975)).

In a recent case, Art Neon Co. v. City and County of Denver, 488 F.2d 118 (1973), the court held that a legislative determination concerning termination of a billboard use must only meet the test of reasonableness, and it is not required that owners affected receive compensation. The court stated that an ordinance regulating billboards was within the police power, and not within the just compensation requirements under the power of

eminent domain (Art Neon Co. v. City and County of Denver, supra, at p. 123).

It is beyond dispute that Petitioner has no constitutional right to payment of compensation (Desert Outdoor Advertising, Inc. v. County of San Bernardino, supra; Markham Advertising Co., Inc. v. Washington, supra), and as demonstrated by the holding in State of Vermont v. Brinegar, supra, there is no right to payment of compensation under federal law because the State of California is free to deny compensation and accept the 10 percent penalty provided by 23 U.S.C. 131(b). 23 U.S.C. 131 creates rights and obligations between the states and the federal government, but clearly creates no rights in individuals affected by state laws enacted pursuant to the federal inducement. When a state chooses to accept the federal inducement, a

contractual relationship is established between the state and federal government (23 U.S.C. 109) which does not create new rights in the citizens of the state. See D.C. Federation of Civil Association, Inc. v. Airis, 129 U.S. App. D.C. 125, 391 F.2d 478 (1968); Mahler v. United States, 306 F.2d 713 (3d Cir., 1962); Daye v. Commonwealth of Pennsylvania, 344 F.Supp. 1337 (E.D. Pa., 1972), aff'd 483 F.2d 294 (3d Cir., 1973), cert. denied sub nom. Meyers v. Commonwealth of Pennsylvania, 416 U.S. 946, 94 S.Ct. 1956 (1974).

Based upon the foregoing, the conclusion is inescapable that since Petitioner's billboards could constitutionally be removed without payment of any compensation whatsoever, the billboards may constitutionally be removed prior to the payment of compensation. It is equally

clear that Petitioner has no rights under 23 U.S.C. 131.

II

THE SUMMARY JUDGMENT WAS A DETERMINATION ON THE MERITS AND PETITIONER WAS NOT DENIED DUE PROCESS OF LAW

Petitioner has taken the incredible position that "Since the judgment herein is a summary judgment, no trial on the merits was held...." (Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, at p. 10). Petitioner argues that "It is elemental to the concept of due process of law that a party be given an opportunity to present its case before a judgment can be entered against it...." and that it was a "victim" of a summary judgment (Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, at pp. 15-16).

California law clearly provides that

a summary judgment is a result of a determination that there is no triable issue of fact and is a judgment on the merits (Martens v. Winder, 191 Cal.App. 2d 143 (1961), C.C.P. § 437(c)).

Federal law is equally clear that a summary judgment is a judgment on the merits. In Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., 421 F.2d 1313 (1970), it was argued that a summary judgment could not have any collateral estoppel effect because it was not a judgment on the merits. The court had little trouble disposing of such a "beguiling but superficial contention".

> "It would be strange indeed if a summary judgment could not have collateral estoppel effect. This would reduce the utility of this modern device to zero.

> It would compel the useless ritual of a formal trial to get the equivalent ruling at the end of the evidence--plaintiff's, defendant's, or all--of a directed verdict. Indeed, a more positive adjudication is hard to imagine. It is determination that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' F.R.Civ.P. 56(c)...." (Emphasis added.)

Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., supra, at p. 1319.

CONCLUSION

The authorities cited herein clearly establish the following:

1. The judgment requiring removal of Petitioner's billboards was based solely on State law.
2. Removal of Petitioner's billboards is accomplished exclusively under the police power, not the power of eminent domain.
3. Billboards may be removed under California law pursuant to the police power without payment of any compensation whatsoever.
4. Removal of billboards under the police power without payment of compensation is constitutional and does not raise a substantial federal question.
5. Petitioner has no rights under 23 U.S.C. 131.

Because Petitioner's constitutional rights have not been violated, and because Petitioner has no rights under federal law, Petitioner has not raised a substantial federal question and the Petition herein should be denied.

DATED: July 1, 1976.

Respectfully Submitted,

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